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90-1848

Supreme Court, U.S.
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No. 90-1848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CARL KALE,

Petitioner,

v.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petition for Writ of Certiorari

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Questions Presented.

I. May a federal Court of Appeals undermine the federal doctrines of *res judicata* and estoppel by judgment by explicitly disregarding, as incorrect *dicta*, a prior federal court's express words of disposition?

II. May a federal Court of Appeals undermine federal rules of waiver and estoppel by allowing a party to collaterally attack, as incorrect *dicta*, a prior federal court's express words of disposition in a proceeding to which it was a party, where it had neither brought the asserted error to the attention of the first court nor appealed from the disposition it now wishes to avoid?

III. May a federal Court of Appeals rewrite the federal rules of compulsory joinder of claims, retroactively, by treating the omission of an alternative basis for jurisdiction over a claim in a prior action, which resulted in a dismissal without prejudice, as the preclusive *omission* of that claim?

List of All Parties.

Petitioner

1. Carl Kale

Respondent

2. Combined Insurance Company of America

Table of Contents.

Questions Presented i
List of All Parties ii
Table of Contents iii
Table of Authorities v
Citations to Opinions Below 1
Jurisdiction 2
Statement of the Case 2

Reasons for Granting the Writ 7

I. A Federal Court's Express Use of the Words "Without Prejudice" in Dismissing a Claim Is Binding, And May Not Be Ignored in Order to Treat That Dismissal As Precluding Further Suit 7

II. The Respondent's Failure to Either Advise District Judge Skinner of the Existence of Diversity Jurisdiction to Secure a Final Adjudication or to Appeal His Use of the Words "Without Prejudice" Should Bar It From Questioning That Disposition 14

III. A Claim That Was Joined Under Pendent Jurisdiction Is Not Transformed Into An "Omitted Claim" Simply Because A Second Basis For Jurisdiction Existed 17

Conclusion 22

Appendix

Decision of the First Circuit, January 25, 1991 ..... A-1
Memorandum by District Judge Tauro May 1, 1990 ..... A-18
Order of District Judge Tauro allowing motion of defendant to dismiss or for summary judgment, May 1, 1990 ..... A-32
District Judge Skinner's Memorandum and Order on Defendant's Motion for Summary Judgment, September 26, 1986 ..... A-33
Decision of the First Circuit denying rehearing, February 26, 1991 ... A-37
Order of the First Circuit denying rehearing *en banc*, February 26, 1991 ..... A-39
Motion for Reconsideration, Vacation of Dismissal, or Remand to State Court, showing District Judge Tauro's denial of motion on face page A-40
Plaintiff's Opposition to Defendant's Motion to Dismiss or for Summary Judgment A-47

Table of Authorities.

CASES.

Allen v. McCurry, 449 U.S. 90 (1980) 11

Balcom v. Lynn Ladder and Scaffolding Co., Inc., 806 F.2d 1127 (1st Cir. 1986) 15

Bath Iron Works Corporation v. Coulombe, 888 F.2d 179 (1st Cir. 1989) 15

Brown v. Board of Education, 347 U.S. 483 (1954) 4

Chicago, Milwaukee St. Paul & Pacific Railroad Co. v. Risty, et al., 276 U.S. 567 (1928) 10

Cromwell v. County of Sac, 94 U.S. 351 (1877) . 11

Crop-Maker Soil Services, Inc. v. Fairmount State Bank, 881 F.2d 436 (7th Cir. 1989) 20

Davis-Gilbert v. Alberto-Culver Co., No. 90-2727, 1991 U.S. App. Lexis 6199, (7th. Cir., April 5, 1991) 20

Deposit Bank v. Frankfort, 191 U.S. 499 (1903) 11

Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980) 15

Fayerweather v. Ritch, 195 U.S. 276 (1904) ... 11

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 11, 18

Gray v. Lacke, et al.,885 F.2d 399 (7th Cir. 1989) 20

In re Public Service Co. of New Hampshire, 898 F.2d 1 (1st Cir. 1990) 15

Kempe's Lessee v. Kennedy, 5 Cranch (9 U.S.) 173 (1809) 11

Kotwitz v. Frank, 902 F.2d 37 (7th Cir. 1990) .. 20

La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V., 914 F.2d 900 (7th Cir. 1990) 20

Local 322, Allied Industrial Workers of America, AFL-CIO v. Johnson Controls, Inc., 921 F.2d 732 (7th Cir. 1991) 20

Mursch v. Van Dorn Company, 851 F.2d 990 (1988) 20

Nevada v. U.S., 463 U.S. 110 (1983) 11

Plessy v. Ferguson, 163 U.S. 537 (1896) 4

Reed v. Allen, 286 U.S. 191 (1932) 11

Rosado v. Wyman, 397 U.S. 397 (1970) 9

Secon Service System, Inc. v. St. Joseph Bank and Trust Company, et al., 855 F.2d 406 (7th Cir. 1988) 20

Shaver v. F.W. Woolworth Co., 840 F.2d 1361 (7th Cir. 1988), *cert den* 488 U.S. 856 (1988) 4, 5, 12, 18-21

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 3, 9, 19

RESTATEMENT (SECOND) OF JUDGMENTS.

§ 20(1)(b) 10
§ 24 10
§ 26(1)(a) 16, 17
§ 26(1)(b) 10, 16

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petition for Writ of Certiorari

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinions of the United States Court of Appeals for the First Circuit entered in this proceeding on January 25, 1991 and February 26, 1991 (denying rehearing).

Citations to Opinions Below.

The opinions of the Court of Appeals in this proceeding, both original and denial of rehearing, re-

ported as *Carl Kale v. Combined Insurance Company of America*, are reported at 924 F.2d 1161 and 1169 (1st Cir. 1991), and appear in the Appendix hereto along with the separate judgment and orders of that court.

The opinion of District Judge Tauro of the United States District Court for the District of Massachusetts in this proceeding is reported at 736 F.Supp. 1183 (D.Mass. 1990) and appears in the Appendix hereto, along with the unreported prior decision of District Judge Skinner in the initial action, rendered September 26, 1986, along with District Judge Taruo's unreported order denying the petitioner's motion for reconsideration of his decision.

Jurisdiction.

The judgment and opinion of the Court of Appeals for the First Circuit were entered on January 25, 1991. A timely petition for rehearing was denied on February 26, 1991, and the opinion and order on that denial are, as indicated above, included in the Appendix hereto. This Petition for Certiorari is being filed on the first business day 90 days after the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Statement of the Case.

The petitioner was employed by the respondent in Massachusetts at Hearthstone Plaza until May 11, 1983. He had worked there since January 29, 1963, first as an employee of the respondent's wholly-

owned and directly-managed subsidiary and then as a direct employee of the respondent after the subsidiary was merged into the parent. He was fired with no prior notice, effective the same day.

The petitioner initially brought suit in the U.S. District Court for Massachusetts on both federal Age Discrimination and state law claims under Massachusetts law on May 8, 1985. Jurisdiction over the state law claims was asserted on the basis of pendent jurisdiction. The federal age discrimination claim was dismissed by District Judge Skinner in 1986 on the basis that the petitioner's administrative agency complaint had been untimely. District Judge Skinner then declined to exercise his discretion to retain the state law contract claim under pendent jurisdiction, and, citing *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), dismissed the state law contract claim "without prejudice."[1]

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[1]*Memorandum and Order on Defendant's Motion for Summary Judgment*, A-33, at A-35 to A-36.

As noted in the opinion of the First Circuit here sought to be reviewed, A-1, at A-3, the petitioner appealed the dismissal of his federal ADEA claim in that action. That appeal sought to have the availability of equitable tolling extended to ADEA actions, which elicited an opinion recognizing such a possibility but denying it in that case. (Dismissal under *Gibbs* was not appealed, as it was a proper exercise of discretion.)

As noted in footnote 2 at A-3, the respondent sought sanctions for the petitioner's even having filed the action, and for taking that appeal. Sanctions were denied after

(continued...)

The current action was brought in Massachusetts' Middlesex Superior Court by the petitioner on May 10, 1989, asserting violation of express and implied promises to him, both written and oral, that he would not be discharged except for just cause. It was removed to the United States District Court for Massachusetts by the respondent, asserting diversity of citizenship, the amount in controversy exceeding the jurisdictional amount. Without answering, the respondent immediately moved to dismiss, or, in the alternative, for summary judgment, on the basis that District Judge Skinner's dismissal was *res judicata*.

The respondent's claim of *res judicata* was based on the argument that the petitioner's state law contract claim, although joined in the original action on the basis of pendent jurisdiction, could also have been supported by diversity jurisdiction, and that the petitioner's failure to plead diversity jurisdiction constituted "claim splitting," on the authority of *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988), *cert den* 488 U.S. 856 (1988).

The petitioner pointed out to District Judge Tauro that the state contract claim had expressly been dismissed "without prejudice" by District Judge

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[1](...continued)
the petitioner pointed out that on the respondent's theory, all those taking test cases should be sanctioned, including Thurgood Marshall, who challenged *Plessy v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Board of Education*, 347 U.S. 483 (1954).

Skinner, explicit language absent from the dismissal leading to *Shaver* (a copy of which the respondent had submitted to District Judge Tauro). The petitioner argued that District Judge Skinner's use of the words "without prejudice" was binding on the respondent, as it had neither sought a conclusive adjudication of the state law claim under diversity jurisdiction nor appealed his use of the words "without prejudice."[2] The petitioner also argued that it would be incorrect and unfair to retroactively expand the rules of bar to use a 1988 case to transform a 1986 dismissal without prejudice into a preclusive dismissal with prejudice.

District Judge Tauro rejected the petitioner's reliance on the express "without prejudice" disposition of the state claim by asserting that they were unnecessary "magic words," as dismissals for lack of jurisdiction are always without prejudice.[3]

In his appeal brief to the First Circuit, the petitioner repeated the arguments he had made to District Judge Tauro.

At oral argument before a panel of the First Circuit, Chief Judge Breyer elicited from counsel for the respondent at oral argument before the panel the admission that the respondent knew of the existence

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[2]See *Plaintiff's Opposition to Defendant's Motion to Dismiss or for Summary Judgment*, A-47, at A-51, and his *Motion for Reconsideration, Vacation of Dismissal, or Remand to State Court*, A-40, at A-45.

[3]See *Memorandum* by District Judge Tauro, A-18 at A-30.

of diversity jurisdiction but chose not to tell District Judge Skinner in the prior action as it did not consider it to be its responsibility to do so, and suggested to respondent's counsel that the respondent should be estopped from asserting this defense by its prior silence on the subject, including its failure to directly appeal the dismissal's being "without prejudice." Petitioner's counsel then offered to provide the First Circuit with copies of his memoranda before District Judge Tauro on this issue, which was declined as unnecessary.

The panel opinion, authored by Circuit Judge Selya, took no account of the admissions elicited at oral argument by Chief Judge Breyer, called the express words of disposition "supererogatory," and disregarded them as being based upon an incorrect and incomplete presentation of the facts.[4]

Having deprived District Judge Skinner's disposition of its normal preclusive effect against challenges to the correctness of the dismissal's being without prejudice, both District Judge Tauro and Circuit Judge Selya adopted the 1988 opinion of the Seventh Circuit which announced the expansion of the concept of "claim splitting" now relied upon by the respondents. They dismissed any protest that applying it retroactively to a 1986 dismissal in this case was unfair surprise, by saying that no exceptions would be made for those who had not followed the rules, even though those rules had never been

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[4]Decision of the First Circuit, January 25, 1991, A-1, at A-13 to A-14.

announced by any court at the time of the prior action,[5] and despite Circuit Judge Selya's opening sentence trumpeting that this appeal presents an issue of "first impression in this circuit."[6]

On rehearing, the First Circuit denied that the use of the words "without prejudice" could bind the respondent, arguing that a prevailing party can never appeal, and asserted that the petitioner had waived any argument that the respondent had waived (or was estopped from advancing) the defense that the original dismissal was preclusive by never having presenting it before the petition for rehearing.

Reasons for Granting the Writ.

I. A FEDERAL COURT'S EXPRESS USE OF THE WORDS "WITHOUT PREJUDICE" IN DISMISSING A CLAIM IS BINDING, AND MAY NOT BE IGNORED IN ORDER TO TREAT THAT DISMISSAL AS PRECLUDING FURTHER SUIT.

The doctrines of *res judicata* and collateral estoppel, as laid down by decisions of this Court, hold that a court's explicit disposition of a claim, entered with jurisdiction after full opportunity to be heard and never appealed, may not be denied binding effect. Waiver and estoppel prevent a party to the initial action from even arguing that the first court acted in ignorance of facts which that party could

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[5] *Id.* at A-12, n. 5.

[6] *Id.* at A-2.

have presented in that action, but which it chose not to present until now.

District Judge Skinner's prior dismissal of the Carl Kale's state law contract claim was expressly "without prejudice."

This disposition was made with jurisdiction to make it, after Combined Insurance (which has now admitted to Chief Judge Breyer that it knew perfectly well at the time that diversity jurisdiction existed, but had chosen not to tell Judge Skinner so) had been fully heard, and it was not appealed by Combined.

Under traditional, *and binding*, principles of *res judicata* and collateral estoppel, that disposition is insulated from review as to its correctness by decisions of this Court, as is argued below.

Justice Skinner consciously chose to use the words "without prejudice" knowing that they are (as District Judge Tauro derisively chose to call them) "magic words"[7] — as are all words of art that have been established as standard dispositions. They have a specific intended effect which may not be disregarded.

To do so, District Judge Tauro argued that they had no effect as they were part of a dismissal on the basis of lack of jurisdiction. This stands all expectations regarding finality on their head, holding that a final judgment can be found because there was no jurisdiction to say that the judgment was not final.

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[7]At A-30.

It also ignores that there *was* jurisdiction, and that District Judge Skinner had simply chosen not to exercise it. As the Supreme Court said, in *UMW v. Gibbs*,

> Certainly, if the federal claims are dismissed without trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate . . . the state claims may be dismissed without prejudice and left for resolution to state tribunals.[8]

If state claims "should" be dismissed, that means that this is the exercise of discretion, and that jurisdiction to retain them does exist.

Gibbs sets out guidelines for the exercise of discretion by the federal courts in exercising their jurisdiction, but it has been widely recognized as allowing federal courts to retain jurisdiction over pendent claims even after the federal claims that brought them to federal court are gone.[9]

Thus, the dismissal "without prejudice" was entered with full jurisdiction to do so, and itself should

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[8]383 U.S. at 726-727.

[9]*See Rosado v. Wyman*, 397 U.S. 397, 403-403 (1970), which approved a district court's retaining jurisdiction of a pendent claim after dismissal of the federal claim. *See also* cases collected at fn. 20 to Jurisdiction § 3567.1, Volume 13B, *Federal Practice and Procedure*, Wright, Miller, Cooper (1984).

be accorded *res judicata* effect, barring the respondent's motion here.

Once District Judge Skinner's disposition is recognized as binding, reversal of District Judge Tauro's dismissal was required. Once the claim's dismissal's being "without prejudice" was established, it is outside *res judicata's* bar of claim splitting.

Both District Judge Tauro and Circuit Judge Selya quoted the *Restatement of Judgments (Second)*, specifically § 24, for the general rule of claim preclusion. The petitioner merely points to § 26(1)(b) of the *Restatement (Second)* which recognizes a clear exception to claim preclusion where:

> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action;

Dismissal "without prejudice" is, of course, the classic way to reserve a plaintiff's right to maintain an action again.[10]

(This is made equally clear by § 20(1)(b), to the same effect, which excludes from the rule of bar cases dismissed "without prejudice.")

District Judge Tauro and Circuit Judge Selya essay to avoid this result by denying District Judge Skinner's order that the state claim be dismissed "without prejudice" *res judicata* effect on the basis

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[10]*Chicago, Milwaukee St. Paul & Pacific Railroad Co. v. Risty, et al.*, 276 U.S. 567 (1928) (dismissal "without prejudice" prevents assertion of *res judicata*).

that District Judge Skinner had incomplete information. This cannot be sustained.

This Court's decisions make it clear that between the original parties — which this petitioner and respondent are — a decision is binding, and cannot be upset on the basis that it was wrong or based on incomplete information.[11]

The only limitations are that such binding effect may be denied if the original decision was void as entered without jurisdiction, or was entered in violation of a party's due process right to be heard, or if the original decision has since been reversed upon appeal.

None of these limitations apply here.

If the federal court had jurisdiction to retain the case if it found it appropriate, then a decision to dismiss in such circumstances could be made either

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[11] *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (incorrectness of prior decision does not rob it of *res judicata* effect); *Deposit Bank v. Frankfort*, 191 U.S. 499, 510, 514 (1903) (reasons for decision not open to inquiry, even if decision would not be the same on a fresh inquiry); *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (purpose of doctrines of *res judicata and collateral estoppel* is to encourage reliance upon decisions); to same effect *see Reed v. Allen*, 286 U.S. 191, 198-201 (1932), *Kempe's Lessee v. Kennedy*, 5 Cranch (9 U.S.) 173, 186 (1809); *Nevada v. U.S.*, 463 U.S. 110, 128-130 (1983); *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877) and *Fayerweather v. Ritch*, 195 U.S. 276 (1904).

with or without prejudice.[12] In fact, as such a dismissal would be on the basis of the exercise of discretion, and not on the basis of lack of jurisdiction, it cannot be assumed to be without prejudice unless clearly stated as such. Thus, the use of the words "without prejudice" is necessary to prevent the dismissal from being preclusive. (Circuit Judge Selya's decision thus goes beyond the Seventh Circuit decision in *Shaver*, which had no explicit reservation of the petitioner's right to sue again to disregard.)

Carl Kale's assertion that District Judge Skinner's dismissal of his state law claim "without prejudice" preserved his right to sue again elicited responses from District Judge Tauro and Circuit Judge Selya that disregarded it as non-binding *dicta*, though they both shied away from using that word, and stretched to find other words to label the express words of disposition unnecessary.

This was a major innovation, seriously limiting the reach of *res judicata*. The irreducible minimum of any decision is its disposition. If *that* can be treated as non-binding dicta, then no part of any decision is safe from this angle of attack.

The reasoning used in this case by Circuit Judge Selya creates a precedent for undermining every decision of every court everywhere. Despite his modest effort to portray it as a straightforward interpretation of *res judicata*, it is much broader than

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[12]See fn. 22, to the work cited in n. 9 *supra*, arguing that such dismissals *should* make explicit whether they are intended to be with or without prejudice.

just the specific facts here, and puts him in the forefront of a major effort at law reform.

The broad impact of his decision can be seen once it is recognized that in every case there is *some* fact introduced by neither side. It is unlikely that if one side omits a key fact for its case that the other side would rush to introduce it.

If District Judge Skinner's use of the words "without prejudice" can be disregarded as *dicta*, then any plaintiff whose case was dismissed "with prejudice" due to a failure of his proof could come back later, after brooding over his case, and say that since there were facts that were not presented that would have led to a different result, the disposition should be not be considered binding, since all dismissals for insufficient proof are automatically with prejudice, making the use of those words "supererogatory."[13]

He would argue that, due to the defendant's failure to present the information that would have enabled the first court to fully adjudge whether or not his case really was worthless, the phrase "with prejudice" "could not have constituted an express [finding of no liability] since [the defendant] had withheld the very information which would have made such a [disposition] meaningful."[14]

He would, of course, quote Circuit Judge Selya's opinion, suggesting that what's sauce for the goose is

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[13]Decision of the First Circuit, January 25, 1991, A-1, at A-13 to A-14.

[14]A-14.

sauce for the gander. Circuit Judge Selya's opinion thus sanctions such an effort by every disappointed litigant who concludes that direct appeal would be unavailing, as the first court had made no reversible error, but a second chance at a trier of fact, with better evidence, would do the trick.

To make a decision's finality depend on its correctness or the completeness of the information placed before the first court means that an assertion of *res judicata* adds nothing in any case. It amounts to an attempt to completely repeal the doctrine. (One of course assumes that it is made in a "good faith effort to extend, modify, or reverse existing law.")

II. THE RESPONDENT'S FAILURE TO EITHER ADVISE DISTRICT JUDGE SKINNER OF THE EXISTENCE OF DIVERSITY JURISDICTION TO SECURE A FINAL ADJUDICATION OR TO APPEAL HIS USE OF THE WORDS "WITHOUT PREJUDICE" SHOULD BAR IT FROM QUESTIONING THAT DISPOSITION.

It is hard to see why Circuit Judge Selya even reached the question of whether District Judge Skinner's incomplete information made his disposition meaningless, much less went out on a limb with his opinion, given Chief Judge Breyer's extraction from the respondent at oral argument of admissions that should be taken to have estopped it from raising this issue on the basis of estoppel by judgment and by its waiver of this issue previously.

It doesn't take much thought to figure out why the respondent didn't tell District Judge Skinner that

diversity jurisdiction existed — it would have resulted in the claim remaining open before him. But why didn't it bring it up in the first set of appeals, from District Judge Skinner's action, and argue there what it is arguing here?

The respondent's reply to Chief Judge Breyer when he asked that question at oral argument before the panel — that it didn't appeal because a prevailing party can't appeal a dismissal without prejudice — is not convincing.

First of all, it was wrong.[15]

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[15] As Chief Judge Breyer correctly responded, "I've read my opinions, and they don't apply."

In re Public Service Co. of New Hampshire, 898 F.2d 1 (1st Cir. 1990), does contain broad dicta to the effect that a prevailing party can never appeal. However, appeal by a prevailing party of a final order that *could* have undesired collateral effects is not prevented either by the very different facts of that case — which refused to allow the appeal of the denial of a motion for leave for an interlocutory appeal, without prejudice to the later filing of a motion to enter final judgment to permit an appeal — nor by the explicit reasoning of the cases it relied upon directly, *Bath Iron Works Corporation v. Coulombe*, 888 F.2d 179 (1st Cir. 1989), and indirectly, *Balcom v. Lynn Ladder and Scaffolding Co., Inc.*, 806 F.2d 1127 (1st Cir. 1986) and *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980).

In fact, *Deposit Guaranty* allowed the prevailing party to appeal on just that basis. The existence of the instant case is a clear collateral effect of the dismissal "without

(continued...)

Secondly, another reason is much more plausible: like the petitioner, the respondent never anticipated the rule of preclusion it now argues he should have seen coming, something the respondent can't admit — because to do so would undercut application of that rule to the petitioner's case.

The respondent's failure to inform District Judge Skinner of the existence of diversity jurisdiction, in order to secure a final decision of all claims in the first proceeding, or to appeal his use of the words "without prejudice" directly, should estop it from collaterally attacking that dismissal's being without prejudice. That issue was expressly decided, even if on incomplete information, and should estop it on the basis of simple waiver.

Even if a court chooses to interpret the doctrine of *res judicata* so narrowly to ignore the explicit dismissal of the state claim "without prejudice," it may not then interpret that doctrine so broadly as to deny its normal exclusions from the rules of claim splitting.

The *Restatement of Judgments (Second)*, from which both District Judge Tauro and Circuit Judge Selya quoted the general rule against claim splitting, provides, as exceptions to the rule of bar not only § 26(1)(b) and § 20(b) just discussed, but also § 26(1)(a) for when:

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[15](...continued)
prejudice" as a with prejudice dismissal would not have allowed a new suit to be filed.

(a) The parties have agreed in terms or effect that the plaintiff may split his claim, or the defendant has acquiesced therein;

It was admitted by the respondent at oral argument before the panel that it knew of the existence of diversity jurisdiction while the case was before District Judge Skinner. Thus, its failure to object to the dismissal without prejudice was a tacit acquiescence to this splitting of the petitioner's claims.

As noted in the Statement of the Case above, this cluster of issues was squarely before both District Judge Tauro and the First Circuit panel that decided the case, and cannot be disregarded on any argument that the petitioner has somehow waived it.

III. A Claim That Was Joined Under Pendent Jurisdiction Is Not Transformed Into An "Omitted Claim" Simply Because A Second Basis For Jurisdiction Existed.

The petitioner has no quarrel with authorities that say that all related claims must be asserted in one's first lawsuit or lost. However, to treat a claim as not asserted — when it *was* asserted but dismissed without prejudice — because only one of two bases for federal court jurisdiction was pled, is to treat the jurisdictional basis as part of the substantive claim.

It is "black letter law" that substance and procedure are separate. Were this not so, diversity actions would have to be tried in federal court under

the rules of procedure of the state whose law created the claim.

District Judge Tauro's and the First Circuit's uses of *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) were totally incorrect, as (1) that case dealt with claims that had been entirely omitted from the first action and (2) the initial actions in that case had been dismissed "in their entirety" (452 U.S. at 396). (As noted above, *Moitie* actually supports the petitioner, as it stands for the proposition that a decision cannot be robbed of *res judicata* effect by saying it was wrong, which is what the First Circuit here did to District Judge Skinner's use of the words "without prejudice.")

Under the letter of the traditional rules of *res judicata*, the petitioner's state law claims are not precluded.

Both the First Circuit and District Judge Tauro rely, however, on the case of *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988), *cert den* 488 U.S. 856 (1988), a two-to-one decision of three-member panel of the Seventh Circuit.

Shaver held, on a fact pattern similar to this one, that the failure of the plaintiff to have asserted diversity jurisdiction in addition to pendent jurisdiction over the state law claims filed in the federal action rendered the dismissal of the state law claims upon dismissal of the federal claim *res judicata*. *Shaver* held, as did the decisions here appealed from, that the duty to join all claims means that all possible jurisdictional bases must be joined, disregarding the distinction between rules of procedure and substantive claims. A bitter dissent in *Shaver* noted that the

other two Justices had reached out to decide this issue although the District Court had granted summary judgment on the merits to the defendant without reaching this issue, and pointed out that there was no authority for requiring the mandatory invocation of diversity jurisdiction rather than trying the remaining state claim in state court, citing *U.M.W. v. Gibbs*.

While the majority in *Shaver* tried to depict their holding as being based on "fundamental and substantial justice" (840 F.2d at 1368), the arbitrary impact of their rule cannot be ignored: Had diversity in *Shaver*'s (or Carl Kale's) original action been precluded by the joinder of a managerial employee as a co-defendant, the rule the *Shaver* majority perceived would not have protected the employer. What aspect of "fundamental and substantial justice" is implicated by allowing a defendant to benefit by the fortuity of whether or not another defendant had also beer joined in an action that has long ago been dismissed?

Shaver's majority should have been frank enough to admit making new law, since they relied for authority on Professor Wright's treatise, not on any source of law. Their result cannot be said to be compelled by any rule of "fundamental and substantial justice," but was itself a "fundamental" departure from tradition.

In an effort to find other courts' treatment of the Seventh Circuit decision in *Shaver*, petitioner's counsel has repeatedly shepardized and conducted Lexis searches on all federal and state court decisions for citations to *Shaver*, most recently this

week. These searches found cases as recent as April 5, 1991, including *Shaver* itself, the opinions here appealed from, eight decisions of the Seventh Circuit, and seventeen decisions of district courts within that circuit. Only one state court decision was found. No decisions of federal courts outside the Seventh Circuit were found, other the denial of certiorari in *Shaver* itself and the opinions here appealed from.

Further, other than the decisions here appealed from no court — even within the Seventh Circuit — has relied on (or even referred to) the Seventh Circuit's departure in *Shaver*.

All but one of the other courts cited *Shaver* for traditional aspects of *res judicata* discussed in the lead-in to its departure from tradition.[16] (The exception was a citation, in *Mursch v. Van Dorn Company*, 851 F.2d 990 (7th Cir. 1988), of the *Shaver* dissent's observation that an employee handbook could become an express contract.)

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[16]*Davis-Gilbert v. Alberto-Culver Co.*, No. 90-2727, 1991 U.S. App. Lexis 6199, (7th. Cir., April 5, 1991); *Local 322, Allied Industrial Workers of America, AFL-CIO v. Johnson Controls, Inc.*, 921 F.2d 732 (7th Cir. 1991); *La Preferida, Inc. v. Cervecería Modelo, S.A. de C.V.*, 914 F.2d 900 (7th Cir. 1990); *Kotwitz v. Frank*, 902 F.2d 37 (7th Cir. 1990); *Gray v. Lacke, et al.*,885 F.2d 399 (7th Cir. 1989); *Crop-Maker Soil Services, Inc. v. Fairmount State Bank*, 881 F.2d 436 (7th Cir. 1989); and *Secon Service System, Inc. v. St. Joseph Bank and Trust Company, et al.*, 855 F.2d 406 (7th Cir. 1988).

Other than the opinions here appealed from, only Professor Wright has cited *Shaver* for the point in issue here (noting in his citation that *Shaver* had relied upon his treatise.)

To adopt the rule announced in *Shaver* would have the undesirable effect of *forcing* plaintiffs to plead diversity as well as pendent jurisdiction to keep their cases in federal court even after dismissal of their federal claims. As a matter of judicial economy, this runs counter to the general effort to minimize the use of diversity jurisdiction.

However, if a Circuit does choose to adopt *Shaver*, it may not do so retroactively. It may not deprive this plaintiff of his day in court where that day in court was expressly reserved to him by Justice Skinner.

It may not ambush the plaintiff by applying the unprecedented March 2, 1988 *Shaver* decision to a case that was filed in 1985 and dismissed in 1986. Had the petitioner any inkling that such a case was on the horizon, diversity jurisdiction would have been asserted along with pendent jurisdiction. The courts below argue that nothing prevented the petitioner from doing so. However, until now, nothing indicated that it would be necessary to do so. Indeed, the oft-expressed preference of federal courts that purely state law cases should be tried in state courts indicated that it would, in fact, be undesirable to do so, being preferable to go to state court with the case if appeal of the dismissal of the federal claim was unsuccessful.

As the general sentiment in the federal courts has been one of hostility to the use of diversity jurisdic-

tion, it is hard to understand why a rule should be adopted to *require* its assertion, rather than to allow a case to be taken back to the state courts after the federal claim involved is dismissed.

The petitioner went to state court with this action because it was clear that an argument could be made that he had waived diversity jurisdiction by not asserting it in his first action. It is the respondent that has asserted diversity jurisdiction here, not the petitioner.

If the rules of compulsory joinder are to be extended to jurisdictional bases as well as claims, it should be done only prospectively. Such a change in the law *may not* be put into effect retroactively. As can be seen here, the effect of such retroactive application is impermissibly harsh and unpredictable, as it robs Justice Skinner's disposition of its intended effect and deprives the petitioner of his day in court.

To change the rules retroactively, on the thinnest of precedent, while pretending that no change has been made, to foreclose a case that was expressly held open, was the grossest abuse of discretion.

Conclusion.

If any reason is needed to invoke this Court's review in this case, the most basic is that the opinions here appealed from attack the root purpose behind the rules of *res judicata* — to protect the parties' right to clarity and certainty of result.

To first deny *res judicata* effect to a decision to dismiss without prejudice on the basis that it was in error, and then to retroactively expand the doctrine

of *res judicata* to convert that dismissal into a dismissal with prejudice is to appropriate the doctrine's name to oppose both its traditional rules and its root purpose.

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No. 90-1848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CARL KALE,

Petitioner,

v.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Appendix to Petition for Writ of Certiorari

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Appendix Table of Contents.

Decision of the First Circuit, January 25, 1991 ..... A-1
Memorandum by District Judge Tauro May 1, 1990 ..... A-18
Order of District Judge Tauro allowing motion of defendant to dismiss or for summary judgment, May 1, 1990 ..... A-32
District Judge Skinner's Memorandum and Order on Defendant's Motion for Summary Judgment, September 26, 1986 ..... A-33
Decision of the First Circuit denying rehearing, February 26, 1991 ... A-37
Order of the First Circuit denying rehearing *en banc*, February 26, 1991 ..... A-39
Motion for Reconsideration, Vacation of Dismissal, or Remand to State Court, showing District Judge Tauro's denial of motion on face page A-40
Plaintiff's Opposition to Defendant's Motion to Dismiss or for Summary Judgment A-47

Appendix.

United States Court of Appeals
For the First Circuit

No. 90-1697

CARL KALE,
Plaintiff, Appellant,

v.

COMBINED INSURANCE COMPANY OF AMERICA,
Defendant, Appellee

January 25, 1991

[924 F.2d 1161]

Appeal from the United States District Court for the District of Massachusetts
[HON. JOSEPH L. TAURO, *U.S. District Judge.*]

Before
BREYER, *Chief Judge,*
COFFIN, *Senior Circuit Judge,*
and SELYA, *Circuit Judge.*

Philip R. Olenick, with whom *Paul L. Nevins* was on brief, for appellant.

Kenneth M. Bello, with whom *Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.* was on brief, for appellee.

Appendix.

SELYA, *Circuit Judge.* This appeal presents an issue of first impression in this circuit. Believing, as we do, that a straightforward application of the hoary doctrine of *res judicata* is dispositive of the question raised, we affirm the district court's dismissal of plaintiff's civil action.

I. BACKGROUND

At all times material hereto, plaintiff-appellant Carl Kale has been a citizen and resident of Massachusetts. He was formerly employed by defendant-appellee Combined Insurance Company of America (Coinco), a "citizen" of Illinois. See 28 U.S.C. § 1332(c) (specifying method of determining corporation's citizenship for purposes of diversity jurisdiction). In May 1983, after some two decades with Coinco and its predecessor in interest, appellant was cashiered.

Seeking vindication, Kale filed suit in the United States District Court for the District of Massachusetts. He pled federal question jurisdiction, 28 U.S.C. § 1331, and alleged that his firing violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. He adorned his ADEA complaint with pendent state-law claims for intentional infliction of emotional distress and breach of an implied covenant of good faith and fair dealing (predicated upon Coinco's alleged failure to abide by promises made in its personnel manual). The case was assigned to Judge Skinner. The state-law claim for intentional infliction of emotional distress was voluntarily discontinued at a relatively early date. Later

on, Judge Skinner granted summary judgment, finding the federal statutory claim to be time-barred.

Inasmuch as Kale's complaint to all intents and purposes asserted only federal question jurisdiction,[1] rejection of the ADEA count seemingly ended the federal court's interest in the matter; at any rate, Judge Skinner dismissed the appended state-law claim at that juncture, writing: "Since I have disposed of plaintiff's lone federal claim, I now dismiss without prejudice [the remaining] state cause of action over which there was only pendent jurisdiction." Appellant — who does not dispute that he knew at the time that diversity of citizenship existed — did not alert the court to, or make any effort to assert the presence of, diversity jurisdiction, 28 U.S.C. § 1332(a). By the same token, he neither sought reconsideration of, nor appealed, the dismissal of his state-law claim. He did appeal the entry of summary judgment on the ADEA claim. He lost. *See Kale v. Combined Ins. Co.*, 861 F.2d 746, 750-56 (1st Cir. 1988). That ended the original action (which we will henceforth refer to as "*Kale I*").[2]

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[1]The appellant did mention 28 U.S.C. § 1332 in a string citation in his original complaint. See *Kale v. Combined Ins. Co.*, 736 F. Supp. 1183, 1184 n.3 (D. Mass. 1990) (describing original complaint). But, this cursory reference was totally inadequate to put the district court on inquiry notice.

[2]In the appeal, we also dealt with Coinco's request that the plaintiff be sanctioned. *See Kale I*, 861 F.2d at

(continued...)

The waters did not remain placid for long. In May 1989, Kale filed a new suit in a Massachusetts state court, alleging a tsunami of state-law claims, e.g., breach of contract (based on the personnel manual), promissory estoppel, tortious breach of the implied good faith/fair dealing covenant. Diversity jurisdiction being apparent from the face of the record, Coinco removed the case to the federal district court. *See* 28 U.S.C. §§ 1332(a), 1441. It then moved to dismiss the action based on the preclusive effect of *Kale I*. The district court (Tauro, U.S.D.J.) granted the motion, ruling that the failure to bring the state-law claims under diversity jurisdiction in Kale I barred the assertion of those claims in another, later proceeding. *See Kale v. Combined Ins. Co.*, 736 F.Supp. 1183 (D. Mass. 1990) (*Kale II*). This appeal followed.

II. QUESTION PRESENTED

In framing the issue on appeal, we think it useful to begin by cataloguing what is not legitimately at issue.

1. There is no dispute that the plaintiff could have established diversity jurisdiction in *Kale I*, but failed properly to plead it. *See Kale II*, 736 F. Supp. at 1184 & n.3. Indeed, the record does not indicate

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[2](...continued)
756-61. The matter of sanctions is immaterial for present purposes.

that Kale at any time alerted Judge Skinner to the existence — or even the possibility — of diversity jurisdiction.

2. Kale has never contended that his claims, or any of them, were so lacking in value as to fall below the "amount in controversy" requirement for diversity jurisdiction, *see* 28 U.S.C. § 1332(a).

3. It is beyond peradventure that the dismissal of a claim as time-barred constitutes a judgment on the merits, entitled to preclusive effect. *See, e.g., Rose v. Town of Harwich*, 778 F.2d 77, 80 (1st Cir. 1985) (listing cases that illustrate trend towards giving claim-preclusive effect to dismissals based on statutes of limitations), *cert. denied*, 476 U.S. 1159 (1986); *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978) (per curiam); cf. Fed. R. Civ. P. 41(b). Thus, the disposition of the ADEA claim in *Kale I* comprised a suitable springboard for the deployment of res judicata.

4. The parties agree that, given the contours of the *Kale I* record, Judge Skinner had every right to dismiss the state-law claim without prejudice once the federal cause of action was resolved on the merits. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). In any event, Kale did not appeal from the dismissal order.

5. It is also uncontested that the implied contract claim in *Kale II* was pleaded and dismissed in *Kale I*. While the parties do dispute whether the other state-law claims pleaded in *Kale II* were "brought" in *Kale I*, we need not enter that debate. The judgment in *Kale I* was rendered by a federal court acting under its federal question jurisdiction. Hence, the avail-

ability of a *res judicata* defense in this case depends on the federal-law standard. *See, e.g., Cerner*, 583 F.2d at 832. Once there has been an adjudication on the merits, federal law stipulates that all claims which are "part of the same cause of action" are extinguished, whether or not actually asserted in the original action. *See Nilsen v. City of Moss Point*, 701 F.2d 556, 562 (5th Cir. 1983) (en banc); *see also Lovely v. Laliberte*, 498 F.2d 1261, 1263 (1st Cir.), *cert. denied*, 419 U.S. 1038 (1974); *cf. Flumara v. Fireman's Fund Ins. Cos.*, 746 F.2d 87, 91 (1st Cir. 1984) (same; New Hampshire law); *Isaac v. Schwartz*, 706 F.2d 15, 16 (1st Cir. 1983) (same; Massachusetts law). In other words, the doctrine of *res judicata*, in its federal formulation, insists that the decision in *Kale I* must preclude in a subsequent suit (1) all claims which were actually brought in *Kale I* and (2) all related claims, i.e., all claims arising out of the same cause of action.

6. Whatever the relationship between the state-law claims asserted, variously, in the two complaints, it is beyond cavil that, at the very least, the claims pleaded in *Kale II* could all have been joined in Kale's original complaint. *See* Fed. R. Civ. P. 8(e)(2) (a plaintiff may set forth multiple statements of claim in a single complaint); Fed. R. Civ. P. 18(a) (a party may join in a single action "as many claims . . . as the party has against an opposing party").

Having tapered the lens of inquiry, it can be seen that this appeal, stripped to bare essentials, presents the following question: when a state-law claim, originally brought pendent to a federal claim, is dismissed without prejudice for want of subject

matter jurisdiction following rejection of the joined federal claim on the merits, under circumstances where the plaintiff could have asserted an alternative jurisdictional basis but did not, and the plaintiff thereafter brings a new suit against the same defendant which includes the pendent state-law claim as well as other state-law claims which could have been pleaded in the initial suit; *quaere:* are the state-law claims in the second suit precluded by the original adjudication? Put another way, should the judgment in *Kale I* be accorded preclusive effect with respect to the claims asserted in *Kale II*, inasmuch as those claims could have been prosecuted in *Kale I* had the plaintiff elected to plead an available alternative basis for jurisdiction?[3]

III. ANSWERING THE QUESTION

We answer the question presented in the affirmative, holding that when a plaintiff pleads a claim in federal court, he must, to avoid the onus of claim-splitting, bring all related state claims in the same

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[3]It makes no theoretical difference that *Kale II* was removed to a federal venue. Had Coinco not removed the case, the result in the state superior court should be identical to the result reached here. After all, *Kale I* ended in a federal judgment and Massachusetts law provides for the application of federal *res judicata* principles when the "preclusive effect of a Federal court's judgment" is at issue. *See Anderson v. Phoenix Inv. Counsel of Boston, Inc.*, 387 Mass. 444, 440 N.E.2d 1164, 1167 (1982).

lawsuit so long as any suitable basis for subject matter jurisdiction exists. We reach this conclusion without special deference to the decision below. The case was decided on a motion to dismiss brought under Civil Rule 12(b)(6) and appellate courts ordinarily review such rulings *de novo*. *See Gonzalez-Bernal v. United States*, 907 F.2d 246, 248 (1st Cir. 1990); *see also Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990) ("[i]n the Rule 12(b)(6) milieu, an appellate court operates under the same constraints that bind the district court").[4]

A.

We start our analysis with some abecedarian truths. Under a federal-law standard, the essential elements of claim preclusion are (1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and later suits; and (3) an identity of parties or privies in the two

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[4]Even if the submission of counsel's affidavit, containing copies of relevant *Kale I* materials, effectively converted the motion into a summary judgment motion, see Fed. R. Civ. P. 12(b), the standard of appellate review would remain the same. *See, e.g., Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990) (appellate review of summary judgment is plenary); *Mack v. Great Atlantic and Pacific Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989) (same).

suits. *See In re Air Crash at Dallas/Fort Worth Airport*, 861 F.2d 814, 816 (5th Cir. 1988); *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983 (3d Cir. 1984); *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). Two elements are unarguably in evidence here. First, there was a final judgment in *Kale I*, comprising an adjudication on the merits for purposes of claim preclusion. *See supra* pp. 4-5. Second, there was an absolute identity of parties in *Kale I* and *Kale II*. Any hope of avoiding preclusion must, therefore, rest with the least mechanical of the three requirements: identity of cause of action.

Concededly, the phrase "identity of cause of action" is more easily stated than defined. *See Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 944 (7th Cir. 1981). A single cause of action can manifest itself in an outpouring of different claims, based variously on federal statutes, state statutes, and the common law. *See Athlone*, 746 F.2d at 983. Yet, such heterogeneity alone does not work an exception to the rule of preclusion. So long as different theories of recovery, howsoever prolific, derive from the same cause of action, the requisite identity is achieved if, and to the extent that, all such theories concern "the same operative nucleus of fact." *Lovely*, 498 F.2d at 1263. In other words, as long as the "new complaint grows out of the same 'transaction or series of connected transactions' as the old complaint," *Isaac*, 706 F.2d at 17 (quoting Restatement (Second) of Judgments § 24), the causes of action are considered to be identical for *res judicata* purposes. Thus, if the claims asserted in

Kale I and *Kale II*, respectively, were sufficiently related, that is, if they were founded upon the same transaction, arose out of the same nucleus of operative facts, and sought redress for essentially the same basic wrong, the two suits advanced the same cause of action notwithstanding any differences in remedies sought or theories of recovery pleaded. *A fortiori*, our focus must not be the theoretical raiment in which the claims are robed, but "whether the underlying facts of both transactions were the same or substantially similar." *Manego v. Orleans Bd. of Trade*, 773 F.2d 1, 6 (1st Cir. 1985), *cert. denied*, 475 U.S. 1084 (1986).

In light of the foregoing, it necessarily follows that a particular legal theory not pressed in the original suit will nonetheless be precluded in the subsequent one if it prescinds from the same set of operative facts. *See, e.g., Cemer*, 583 F.2d at 832 ("Where two successive suits seek recovery for the same injury, a judgment on the merits operates as a bar to the later suit, even though a different legal theory of recovery is advanced in the second suit."). In this way, the law prevents a litigant from claim-splitting, requiring that he "assert all his various legal theories and factually related allegations the first time he brings suit." *Rose*, 778 F.2d at 79.

We turn from the general to the specific. It is nose-on-the-face plain that the claims in *Kale II* stemmed from the same transactional hub as the claims previously mounted in *Kale I*. Though dressed in somewhat different garb, the claims all sought recovery in consequence of the same occurrence: defendant's unilateral termination of the plaintiff's employment.

The differences were differences in the theories of liability and the selection of remedies, not differences in the fundamental cause of action. As the district court found, there was an identity of cause of action. *See Kale II*, 736 F. Supp. at 1185-86 & n.7.

It appears, then, that all the elements of classic claim preclusion are present in this situation. Unless *res judicata* is to be robbed of its doctrinal significance, appellant had an obligation to cluster his theories of recovery in *Kale I*, by whatever necessary jurisdictional means, or else forever hold his peace.

B.

Existing precedent, though scanty, supports such a preclusionary result. The only case directly in point — and it could hardly be more so — is *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988). There, the situation was virtually identical. Shaver, a discharged employee, sued for age discrimination in the district court, asserting federal question jurisdiction and joining pendent state claims. *Id.* at 1363. The district court granted summary judgment in defendant's favor, finding Shaver's ADEA claim untimely. *Id.* The court declined to exercise pendent jurisdiction over the state claims and dismissed them. Id. Shaver, who realized "that diversity jurisdiction existed," *id.* at 1364 n.1, made no effort "to allege an alternative jurisdictional basis in an attempt to pursue his state law contract claims" in the original

action. *Id.* at 1363. Instead, he brought a fresh suit in the state court alleging a variety of state-law claims. *Id.* As here, the defendant removed the case to the federal district court pursuant to 28 U.S.C. §§ 1332, 1441.

The district court in the second *Shaver* case granted summary judgment on grounds independent of *res judicata*. The Seventh Circuit, however, went directly for the jugular, holding squarely that:

> Because Shaver neglected to assert the existence of diversity jurisdiction in his prior action in order to pursue his breach of contract claims, both the strict test of and the policy behind the *res judicata* doctrine bars the present action.

Shaver, 840 F.2d at 1368; *see also* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4412 at 67-68 n.0.6 (Supp. 1990) (discussing *Shaver* with approval).

Appellant does not dispute that *Shaver* is on all fours with his case. Rather, he claims it was wrongly decided. We do not agree. In our view, the reasoning of the *Shaver* majority, 840 F.2d at 1364-68, is impeccable. We adopt it enthusiastically, without exegetic discussion. There is simply no point in attempting to reinvent so well-fashioned a wheel.

Appellant also essays an end run around *Shaver*, arguing that, even if *Shaver* is good law, he could not reasonably have been expected to anticipate the holding.[5] Whatever the merits of the Seventh

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[5]*Shaver* was decided well after Judge Skinner dismissed the state-law claim in *Kale I*.

Circuit's opinion, appellant's thesis runs, a grave injustice would result from "retroactively" foisting the *Shaver* rule upon him. The plea holds little water. While the circumstances of Kale's case are admittedly unusual, the doctrine governing its resolution is quite mature and unencumbered by contradictions or ambiguities in respect to the question at hand. Rather than emanating from some dark interstice of the law, the district court's holding in *Kale II* was entirely predictable. So, too, was the outcome in *Shaver*. There is no unfairness, under all the circumstances, in declining to extricate the plaintiff from a self-dug hole.

C.

Appellant is not short of fall-back positions. He contends that, even if the rule is as we envision it, his case is outside the rule because Judge Skinner dismissed the state-law claim in *Kale I* "without prejudice." This contention represents an unvarnished attempt to squeeze an elephant's foot into a pony's shoe. To be sure, claim preclusion can be avoided where "the court in the first action has expressly reserved the plaintiff's right to maintain the second action." Restatement (Second) of Judgments § 26(1)(b) (1982). But, the exception does not pertain here. Judge Skinner's use of the phrase "without prejudice" was supererogatory, because the dismissal of pendent claims on jurisdictional grounds is always without prejudice. *See* Fed. R. Civ. P. 41(b); *see also United Mine Workers*, 383

U.S. at 726-27; *Rose*, 778 F.2d at 79. Thus, the phrase "without prejudice" added nothing to what transpired. In any event, the phrase could not have constituted an express reservation, as Kale had withheld from the judge the very information which would have made such a reservation meaningful. *See infra* Part III(D).

D.

Appellant's next initiative hawks a further exception to claim preclusion. In general, the rule requiring all claims arising from a single cause of action to be asserted in a single lawsuit will not apply if the plaintiff was unable to assert a particular claim or theory in the original case "because of the limitations on the subject matter jurisdiction of the courts." Restatement (Second) of Judgments § 26(1)(c) (1982). This jurisdictional competence exception permits the maintenance in a second suit of a claim stemming from the cause of action previously sued upon "if a jurisdictional obstacle has precluded raising that issue in the first action." *Pasterczyk v. Fair*, 819 F.2d 12, 14 (1st Cir. 1987).

For the jurisdictional competence exception to flower, it must be shown that the claim pressed in the second suit could not have been asserted and resolved in the first suit by reason of limitations on the first court's jurisdiction. This determination must be made by the second court, giving preclusive effect to any jurisdictional determinations made by the first court (so long as the requirements of collat-

eral estoppel, i.e., issue preclusion, have been met).[6] Accordingly, when *Kale II* arose, it was up to Judge Tauro to determine whether the nonfederal claims could have been litigated in *Kale I* if the plaintiff had chosen to engage the district court's diversity jurisdiction, and if so, the legal effect of that fact.

Judge Tauro's response was patently correct on all scores. The existence of an alternate hook on which federal court jurisdiction could have been hung, permitting state-law claims to be freely litigated in a federal forum, rendered the competency exception inapplicable. After all, for it to pertain, the jurisdictional obstacle to joinder of all claims must be attributable to limitations on the first court's power to hear and decide a claim rather than to a party's contrivance.

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[6]There was no issue preclusion applicable to the defense raised in *Kale II*. Since Judge Skinner was not made aware of the existence of diversity jurisdiction, his dismissal could only have been based on the special nature of pendent jurisdiction. Thus, the only preclusive effect the dismissal could have would be to forestall litigation of that particular issue, not the broader issue of whether jurisdiction could have been achieved in some other way. So, while *Kale I* finally determined that there was no pendent jurisdiction for the state-law claim, it did not in any way purport to determine that nonfederal claims could not otherwise have been brought within the district court's subject matter jurisdiction.

E.

There is one last arrow in appellant's quiver. He importunes that, regardless of ordinary rules of *res judicata*, the equities demand that his current suit be given free passage. This entreaty overlooks, however, that the doctrine of *res judicata* is no "mere matter of practice or procedure," but "a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (citation omitted). Although we have recognized the existence of judicial power to make an "occasional exception" to claim preclusion in order "to prevent unusual hardship," *Rose*, 778 F.2d at 82, this case does not fit that narrow mold. Appellant knew of the existence of diversity jurisdiction in *Kale I* and chose not to assert it.It was this choice — and this choice alone — that led to Judge Skinner's order of dismissal. In short, appellant's splitting of his claims was voluntary: he had a full and fair opportunity to litigate all his claims in *Kale I*, but declined to avail himself of it.

We see no injustice in applying time-honored principles of claim preclusion in such a situation. Whenever a litigant decides to enter the court system to seek justice, he must play by the rules. Any idiosyncratic unfairness that may result from the consistent and straightforward application of preclusion principles is, we think, far outweighed by the systemic benefits which flow from steadfast adherence

to so salutary a doctrine. *See Moitie*, 452 U.S. at 401-02. As *Rose* teaches:

> [I]f courts relaxed the principles of claim preclusion every time it appeared that a litigant had a strong claim 'on the equities,' the doctrine would fail to serve its purposes of promoting judicial economy and repose. In some individual instances a fairer result might be achieved, but more often the litigation of stale claims and the resulting uncertainty would mean injustice or hardship.

778 F.2d at 82. There is no basis for abandoning the rules in this case.

IV. CONCLUSION

We need go no further. Appellant's failure to assert diversity jurisdiction when it unarguably existed, and he knew as much, gave the judgment in *Kale I* wide-ranging preclusive effect. *Kale II*, therefore, exemplified the classic claim preclusion paradigm. Because of this, and because the case did not fall within an exception to the normal rules of *res judicata*, Judge Tauro's dismissal order was wholly appropriate.

Affirmed.

Appendix.

United States District Court
District of Massachusetts

Carl Kale,
Plaintiff,

v. CA No. 89-1640-T

Combined Insurance
Company of America,
Defendant

MEMORANDUM
May 1, 1990

[736 F. Supp. 1183]

TAURO, D.J.

Plaintiff, Kale is a Massachusetts resident and a twenty year employee of Defendant and its predecessor-in-interest. In May 1989, he brought an action in Middlesex County Superior Court alleging a host of state law claims stemming from his employment termination in March 1983. Defendant, Combined, an Illinois corporation with a principal place of business in that state, timely removed the action to this court on the basis of diversity of citizenship.

Appendix.

Now, Combined asks this court to dismiss this case on *res judicata* grounds.[1] It argues that the claims raised now by Kale could have been asserted in a 1985 federal suit filed by him, that was later dismissed by Judge Skinner in September 1986. Combined argues further that Kale's failure to raise these claims in the 1985 suit precludes them now.

This motion to dismiss raises the novel question of whether a plaintiff asserting federal question jurisdiction in federal court must, on pain of later preclusion, also assert diversity jurisdiction, where available, in order to join all related state claims.

I.

Back in May 1985, Kale filed a civil action in the United States District Court for the District of Massachusetts, alleging that his employment was terminated in violation of the Age Discrimination in Employment Act ["ADEA"], 29 U.S.C. § 621, *et seq. See Carl Kale v. Combined Insurance Company of America*, C.A. No. 85-1840-5 (D. Mass. dismissed Sept. 26, 1986) (Skinner, J.) [*"Kale I"*]. In addition, Kale's complaint raised state law claims of intention-

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[1]Here, *res judicata* is used in its narrower sense to describe the doctrine of claim preclusion pursuant to which "a final judgment on the merits bars a new suit on the same claim or cause of action." 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice*, ¶ 0.401 n. 13 (2d ed. 1984).

al infliction of emotional distress and breach of the covenant of good faith and fair dealing.[2]

With respect to the state claims, Kale asserted discretionary pendent jurisdiction. Diversity jurisdiction was never properly plead.[3]

Kale I's ADEA claim was dismissed as timebarred. See *Kale I, aff'd*, 861 F.2d 746 (1st Cir. 1988). With the lone federal claim gone, the court, having no apparent independent jurisdictional basis for adju-

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[2]The claim for intentional infliction of emotional distress was voluntarily dismissed on October 8, 1985.

[3]Although Kale nominally cited 28 U.S.C. § 1332 among a list of jurisdictional citations in his original federal complaint, he failed to make the requisite pleading as to jurisdictional amount. *See* 28 U.S.C. § 1332(a). The burden of proving the existence of the elements necessary for diversity jurisdiction, of course, lies with the pleader. *See Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) (finding plaintiff responsible for claiming the sufficiency of jurisdictional amount); *Topp v. CompAir, Inc.*, 814 F.2d 830, 839 (1st Cir. 1987). Kale made no formal allegation that he had met the jurisdictional amount requirement. *See Berman v. New Hampshire Jockey Club, Inc.*, 292 F. Supp. 993, 998 (D.N.H. 1968). Moreover, the only specific monetary claim in the complaint which could colorably satisfy the jurisdictional amount pleading requirement was a $1,000,000 claim for intentional infliction of emotional distress. This claim was voluntarily dismissed by Kale nearly one year before Judge Skinner allowed the motion for summary judgment in *Kale I*. No jurisdictional amount remained, therefore, once the intentional infliction claim was excised.

dicating the related state claims, declined to exercise pendent jurisdiction. *Id.* (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)). With respect to these state claims, the court purported to dismiss them "without prejudice."

In this action, *Kale II*, which was removed from state court on the basis of diversity of citizenship,[4] plaintiff asserts several state law claims of wrongful termination.[5] Combined moves to dismiss because the claims raised in *Kale II* should have been included in the *Kale I* action. It contends that, had diversity jurisdiction been plead in *Kale I*, the state law claims could have been adjudicated on the merits. And so, because the pendent state claims *could* have been adjudicated in *Kale I*, pursuant to the court's mandatory diversity jurisdiction, they are now barred.

Kale's response is that the court in *Kale I* specifically dismissed the state claims "without prejudice."

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[4]Kale has never disputed that diversity jurisdiction was available in both *Kale I* and *Kale II*.

[5]Specifically, Kale seeks a declaration that he had the right to continued employment terminable only for just cause, and that Combined was bound to its predecessor-in-interest's promise that Kale's employment was extended and maintained on that basis. Counts I, II. Counts III, IV, and V claim breach of an implied contract, an oral contract, and an employment contract, respectively. Count VI charges Combined with having negligently breached both the implied covenant of good faith and fair dealing and specific contractual rights. Finally, count VII alleges promissory estoppel.

He argues, that these wholly state-created claims cannot now be barred by the fortuity of defendant's having removed *Kale II* to federal court.[6]

III.

Res judicata is a firmly rooted rule of "'fundamental and substantial justice,'" not "'a mere matter of practice or procedure inherited from a more technical time than ours.'" *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)). Indeed, once the elements for claim preclusion have been established, there is little room for the making of "'ad hoc determination(s) of the equities in a particular case.'" *See Rose v. Town of Harwich*, 778 F.2d 77, 82 (1st Cir. 1985)

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[6]At oral argument, Combined expressly contested the suggestion that, had they allowed the suit to go forward in state court, a divergent result on *res judicata* grounds would have been permissible. Its counsel stressed that a state court would have been compelled to raise the same bar against any claims which could have, and thus should have, been raised in *Kale I*. *See Anderson v. Phoenix Investment Counsel of Boston, Inc.*, 387 Mass. 444, 440 N.E.2d 1164 (1982) (ruling that preclusive effects of a federal judgment should be determined under federal law, and that failure to assert state claims under federal court's pendent jurisdiction raised bar to second action in state court).

(quoting Moitie, 452 U.S. 394 at 401). Because public policy demands that there be an end to litigation, the doctrine has been consistently invoked to "protect adversaries from the expense and vexation attending multiple lawsuits," "conserve[] judicial resources," and "foster reliance on judicial action by minimizing the possibility of inconsistent decisions." *Walsh v. International Longshoremen's Assoc., Local 799*, 630 F.2d 864, 867-68 (1st Cir. 1980) (citations omitted). *See also Allen v. McCurry*, 442 U.S. 127 (1980).

A claim is deemed precluded when there is: "(1) identity or privity of the parties to the action; (2) identity of the causes of action; and (3) a prior judgment on the merits." *Associated General Contractors v. Boston District Council of Carpenters*, 642 F. Supp. 1435, 1438 (D. Mass. 1986).

Here, the parties are identical. No one argues otherwise, nor does this suit's caption differ from the original one.

With respect to the identity of claims, the Restatement (Second) of Judgments makes clear that claims or causes of action are identical for claim preclusion purposes when they are "part of the transaction, or series of connected transactions, out of which the action arose." Restatement (Second) of Judgments,§ 24(1) (1980). *See also Rose*, 778 F.2d at 79. Applying the federal definition of a claim or cause of action, *Kale I* and *Kale II* arise from the same core of operative facts — Combined's termina-

tion of Kale — and as such, constitute the same claim.[7]

Lastly, the dismissal of *Kale I* on statute of limitations grounds constituted a valid and final judgment. There is overwhelming support for giving preclusive effect to dismissals based on the statute of limitations. *See Thompson Trucking, Inc. v. Dorsey Trailers*, 880 F.2d 818 (5th Cir. 1989); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178 (4th Cir. 1989); *PRC Harris v. Boeing Co.*, 700 F.2d 894 (2d Cir. 1983); *Myers v. Bull*, 599 F.2d 863 (8th Cir. 1979); *Cemer v. Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978); *Chang v. Northwestern Memorial Hosp.*, 549 F. Supp. 90 (N.D.Ill. 1982); 18 C. Wright, A. Miller & E. Cooper, 18 *Federal Practice and Procedure*, § 4441 (1981) [Wright & Miller]. *Cf. Rose*, 778 F.2d at 80 ("For one thing, our survey of

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[7]Even though some different claims are raised in the second action, for purposes of claim preclusion they are nonetheless the same:

> That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kind of relief.

Restatement (Second) of Judgments, § 24(2) comment c.

recent cases suggests a clear trend toward giving preclusive effect to dismissals based on the statute of limitations.") Once there is such an adjudication on the merits, all related claims that could have been brought are extinguished. *See Moitie*, 452 U.S. 394 at 398; *Isaac v. Schwartz*, 706 F.2d 15, 17 (1st Cir. 1983) ("The issue is not whether the plaintiff in fact argued his . . . claims in the [first] proceeding, but whether he could have.'") (quoting *Lovely v. Laliberte*, 498 F.2d 1261, 1263 (1st Cir. 1974)); Restatement (Second) of Judgments, § 24(1); Wright & Miller, §4411 at 86 ("A second action may be precluded on the ground that the same claim or cause of action was advanced in the first action even though a different source of law is involved.")

IV.

Combined's motion to dismiss theorizes that not only all legal theories should have been brought in *Kale I*, but also that all jurisdictional bases, including diversity jurisdiction, should have been asserted as well. This court agrees. Indeed, several Supreme Court Justices have expressed this view with respect to the assertion of contingent pendent jurisdiction in an original federal question case.[8] *See Moitie*, 452

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[8]In *Moitie*, after a federal antitrust action was dismissed for failure to assert a proper injury, a second action removed to federal court asserting state law theories was *res judicata*. The majority believed that it only needed to

(continued...)

U.S. 394 at 404 (Blackmun, J., with whom Marshall, J. joins, concurring in judgment) ("The dismissal of *Brown I* is *res judicata* not only as to all claims respondents actually raised, but also to all claims that could have been raised."). *Id.* 452 U.S. at 411 (Brennan, J., dissenting) ("[I] would hold that the dismissal of *Brown I* is *res judicata* not only as to every matter that was actually litigated, but also as to every ground or theory of recovery that might have been presented.").[9]

The only Circuit Court of Appeals answering this question with respect to diversity jurisdiction has held that a failure to assert the existence of diversity jurisdiction over state claims in a prior federal action precludes their assertion in a second action. *See Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988). The facts of *Shaver* are extraordinarily similar to those here. There, too, a federal

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[8](...continued)
reach the question of whether the federal law claims were precluded. It left unanswered the question whether the state claims were also foreclosed. On remand, however, the Court of Appeals, agreeing with the reasoning of Justice Blackmun's concurrence, ruled that the state claims were *res judicata*.

[9]Courts of Appeals have reached the same result. *See, e.g., Harper Plastics v. Amoco Chemical Corp.*, 657 F.2d 939 (7th Cir. 1981) (failure to assert discretionary pendent jurisdiction barred second action); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (same).

action under the ADEA and various pendent state claims was brought by a former employee. After finding the federal claim time-barred, the district court refused to exercise pendent jurisdiction over the state claims. A second action brought in state court was removed to federal court on the basis of diversity of citizenship. Once there, the defendant moved for summary judgment on *res judicata* grounds and on the merits. Passing over the *res judicata* issue, the district court entered a summary judgment in defendant's favor on the merits.

The Court of Appeals for the Seventh Circuit, believing that the lower court should have avoided deciding the state law issues if it could have ruled solely on *res judicata* grounds, likewise dismissed the second suit, but for reasons of claim preclusion.[10]

V.

Even when, as here, the preconditions for preclusion are met, some courts have recognized the necessity of an "occasional exception to prevent undue hardship." *See Rose*, 778 F.2d at 82. *See also Moitie*, 452 U.S. 394 at 403 (Blackmun, J., with

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[10]Professors Wright and Miller, commenting on the *Shaver* decision, agree that "a plaintiff who could invoke both federal and diversity jurisdiction should not be allowed to bypass the opportunity to secure a single adjudication of all claims." Wright & Miller, § 4412 at 67-68 n. 0.6 (Supp. 1990).

whom Marshall, J. joins, concurring in judgment). *Rose* would require a plaintiff to show clearly and convincingly that the policies favoring preclusion in the second action are outweighed by an extraordinary reason. *Rose*, 778 F.2d at 82 (citing Restatement (Second) of Judgment, § 26(1)(f)). This is not such a case. There were no jurisdictional obstacles to Kale bringing his state claims under the district court's mandatory diversity jurisdiction.[11]

Similarly, Kale cannot complain that he was "'caught in a mesh of procedural complexities.'" *Moitie*, 452 U.S. 394 at 403 (quoting *Reed v. Allen*, 286 U.S. 191 (1932) (Cardozo, J., joined by Brandeis and Stone, JJ., dissenting)). The application of *res judicata* to this case is not unduly formalistic, but rather flows as a natural consequence of the application of claim preclusion.[12]

Kale also appears to argue that the policy behind *res judicata* is not served in this case. Specifically,

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[11]Kale's failure to join all theories and jurisdictional bases might have been forgivable if he had a good reason for not being aware of the opportunity to assert diversity jurisdiction. *See* Wright & Miller, § 4412 at 68 n. 0.6 (Supp. 1990). He knew that the parties had diverse citizenship, and indeed made a failed attempt at claiming such jurisdiction.

[12]Indeed, as Wright and Miller explain, where a federal court has full, independent jurisdiction over all legal theories (i.e., federal question and diversity jurisdiction), "several decisions have ruled that . . . there is a single claim, all parts of which must be presented to the first court chosen." Wright & Miller, § 4412 at 95.

Kale contends that if there had not been complete diversity, his second action would not have been barred. That argument, however, misses the point. The policies of efficiency, fairness, and repose are served by application of the *res judicata* bar. *See Shaver*, 840 F.2d at 1367 n.2 ("Multiple lawsuits in separate forums, as well as requiring more than one court to analyze and digest the facts of a case, all have the effect of harassing defendants and wasting judicial manpower — the precise dangers the doctrine intends to prevent."). The doctrine of claim preclusion requires that, barring a jurisdictional obstacle, a plaintiff allege all legal theories for relief flowing from a transaction or series of transactions in his first *voluntarily chosen* forum.[13]

Relying on the dissenting opinion in *Shaver*, Kale also contends that the prohibition against claim-splitting should not apply when the claims are involuntarily split. The case cited on this point by the Shaver dissent, *Nilsen v. City of Moss Point, Miss.*,

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[13]At least one case goes far further than the rule articulated today. *See Falk v. State Bar of Michigan*, 631 F. Supp. 1515, 1521 (W.D. Mich. 1986) ("Plaintiff should not be allowed to hale defendant into a second court simply because the first court in which he chose to sue defendant could not consider all the various theories arising from his single cause of action."). *But see Wright & Miller*, § 4412 at 66 (Supp. 1990) ("It is clear enough that a litigant should not be penalized for failing to seek a unified disposition of matters that could not have been combined in a single proceeding."); Restatement (Second) of Judgments, § 26, comment c.

701 F.2d 556, 563 (5th Cir. 1983), stated a general rule that pendent claims that a federal court refused to entertain should not later be barred. That rule makes sense because, in such a case, a party would have been unable, "through no fault of his own," to have the claims adjudicated in the first forum. *Id.* at 563. In *Nilsen*, however, it was "not the procedural system of the forum that precluded the joinder of all asserted remedies in one proceeding . . . ." *Id.* The court pointed out that "the system itself was . . . ready and able to accommodate [plaintiff's] claims . . . ." *Id.* Instead, it was the plaintiff who split her claim. Similarly, here, the claim-splitting was voluntary. Kale chose the federal forum and then elected to forego his right to invoke mandatory diversity jurisdiction.

Finally, Kale argues that his second action must not be precluded because his pendent state claim was explicitly dismissed "without prejudice" in *Kale I*. His attempt to distinguish *Shaver* on this basis is unpersuasive. With the exception of not incanting the magic words "without prejudice," in both cases, pendent state claims were dismissed for lack of jurisdiction. Dismissals for lack of jurisdiction are not "on the merits." *See* Fed. R. Civ. P. 41(b). *See also Hughes v. United States*, 4 Wall. (71 U.S.) 232, 237 (1866). *Cf. Rose*, 778 F.2d at 79.

Appendix.

V.

For the reasons stated above, defendant's Motion To Dismiss Or, In The Alternative, Motion For Entry Of Summary Judgment is hereby ALLOWED.

An order will issue.

Appendix.

United States District Court
District of Massachusetts

Carl Kale,
Plaintiff,

v. CA No. 89-1640-T

Combined Insurance
Company of America,
Defendant

ORDER
May 1, 1990

TAURO, D.J.

For the reasons stated in the accompanying Memorandum, defendant's Motion To Dismiss Or, In The Alternative, Motion For Entry Of Summary Judgment is hereby ALLOWED.

It is so ordered.

J. L. Tauro
United States District Judge

Appendix.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CARL KALE Plaintiff	*	CIVIL ACTION NO. 85-1840-S
v.	*	
COMBINED INSURANCE COMPANY OF AMERICA, Defendant	*	

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

September 26, 1986

SKINNER, D.J.

Plaintiff brought an action alleging in Count I of the complaint that his employment by the defendant had been terminated in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* He also brought pendent common law claims. Count II of his complaint alleging intentional infliction of emotional distress has already been voluntarily dismissed by order dated October 8, 1985. Count III alleged a breach of a covenant of good faith and fair dealing. Defendant now moves for summary judgment on Counts I and III.

Defendant claims that uncontroverted material facts demonstrate both that plaintiff's ADEA claim is time-barred and that it fails on the merits. Because I agree that plaintiff's claim is time-barred, I do not reach the merits.

Plaintiff was notified on May 11, 1983 that he was being terminated as of that day. He filed a charge of discrimination with the Massachusetts Commission Against Discrimination ("MCAD") on May 3, 1984, 357 days later.

The ADEA states that:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed — . . . (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, . . .

29 U.S.C. 626(d).

Therefore, the express language of the ADEA seems to bar his claim.

It is true that the requirements of § 626 are not jurisdictional requirements. Rather, they are more in the nature of statutes of limitations and may be equitably modified. *Naton v. Bank of California*, 649 F.2d 691, 695-96 (9th Cir. 1981). Equitable tolling of the limitations period may be appropriate if the plaintiff was "excusabl[y] ignorant" of the filing requirement. *Id.*, at 696.

Appendix.

Plaintiff here was not excusably ignorant of the filing period. Section 627 of the ADEA requires that all employers post notices prepared by the Equal Employment Opportunities Commission "to effectuate the purposes of this chapter." 42 U.S.C. § 627. Defendant has submitted an uncontradicted affidavit stating that it had posted all the required notices. Several courts have found that such notices give potential plaintiffs constructive notice of their rights under the ADEA and what they must do to preserve those rights. "If notice is properly posted and the employee does not see it or sees it but is still not aware of his rights, there will normally be no tolling of the filing period." *McClinton v. Alabama By-Products Corporation*, 743 F.2d 1483, 1486 (11th Cir. 1985). *See also, Byers v. Follmer Trucking Company*, 763 F.2d 599 (3d Cir. 1985); *Vaught v. R.R. Donnelley & Sons Company*, 745 F.2d 407 (7th Cir. 1984). Nor has plaintiff suggested any other reason for his delay in filing his charge of discrimination with MCAD, such as any conduct by defendant which might have misled him into thinking that he had no claim. *See, e.g., Dillman v. Combustion Engineering*, 39 FEP Cases 1750 (2d Cir. 1986).

A plaintiff who fails to comply with the filing requirements must, at the very least, put forward an adequate explanation for his failure to comply. This plaintiff has failed to do so, and his claim is therefore time-barred.

Since I have disposed of plaintiff's lone federal claim, I now dismiss without prejudice Count III of his claim which alleges a state cause of action over

which there was only pendent jurisdiction. The exercise of pendent jurisdiction is discretionary. "[C]ertainly, if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Walter Jay Skinner
United States District Judge

Appendix.

United States Court of Appeals
For the First Circuit

No. 90-1697

CARL KALE,
Plaintiff, Appellant,

v.

COMBINED INSURANCE COMPANY OF AMERICA,
Defendant, Appellee

[924 F.2d 1169]

Before
BREYER, *Chief Judge*,
COFFIN, *Senior Circuit Judge*,
and SELYA, *Circuit Judge*.

ORDER OF COURT

Entered: February 26, 1991

The petition for rehearing en banc filed by plaintiff-appellant Carl Kale is, under this court's internal operating procedures, considered both by the panel and by the full court. Panel rehearing is hereby *denied* for the following reasons.

Appellant's argument that his second action should survive because his pendent state-law claim in the first action was dismissed "without preju-

dice" was adequately answered in the panel opinion at pp. 12-13. Appellant's claim that the *res judicata* effect of that language was broader than the panel indicated overlooks that appellee, having won, could not appeal the "without prejudice" dismissal and thus could not be bound by that characterization to the extent urged by appellant. *See In re Public-Serv. Co.*, 898 F.2d 1, 2 (1st Cir. 1990) ("a party cannot appeal a judgment entered in its own favor"); *Bath Iron Works Corp. v. Coulombe*, 888 F. 2d 179, 180 (1st Cir. 1999) (similar); see also *Sierra Club v. Marsh*, 907 P.2d 2100 213 (1st Cir. 1990) ("appellant, having prevailed, could not have appealed [the order]").

Insofar as appellant urges, for the first time, new theories, variously characterized in his petition as "waiver," "acquiescence" and "estoppel by judgment," based on the fact that the defendant knew all along that the plaintiff could have asserted diversity jurisdiction, the contentions are not properly before us. The appellant did not make the contentions below. He did not make them in his appellate briefs. He did not make them at oral argument. He did not request leave, after oral argument, to file a supplemental brief. The points are, therefore, foreclosed. "[A] party cannot be permitted to raise a new issue for the first time on a petition for rehearing in the court of appeals." *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 397 (1st Cir. 1990) (opinion denying rehearing).

The petition for panel rehearing is *denied.*

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1697

CARL KALE,
Plaintiff, Appellant,

v.

COMBINED INSURANCE COMPANY OF AMERICA,
Defendant, Appellee.

BEFORE
Breyer, *Chief Judge*,
Campbell, Torruella, Selya, and *Cyr, Circuit Judges.*

ORDER OF COURT
Entered: February 26, 1991

The panel of judges that rendered decision in this case having denied the petition for rehearing and no judge who was a member of the panel nor any judge in regular active service having requested a vote on the suggestion for rehearing en banc.

It is ordered that the suggestion for rehearing en banc be denied.

By the Court:
Francis P. Scigliano
Clerk.

[cc: Messrs. Olenick and Bello]

Appendix.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CARL KALE,	)	
Plaintiff	)	
v.	)	Civil Action
COMBINED INSURANCE	)	No.85-1840-S
COMPANY OF AMERICA,	)	
Defendant	)	

MOTION FOR RECONSIDERATION, VACATION OF DISMISSAL, OR REMAND TO STATE COURT

Now comes the plaintiff and moves that this honorable Court reconsider its May 1, 1990 grant of the defendant's Motion to Dismiss Or, In The Alternative, Motion for Summary Judgment.

As grounds for this motion, the plaintiff submits the following:

Table of Contents

I. To treat a dismissal which was expressly "without prejudice" as being with prejudice violates both the letter and the purpose of the rules of *res judicata* 2
A. The rules of *res judicata* clearly exclude from their scope claims that were expressly dismissed "without prejudice" in the prior action 2
B. If this Court is to follow *Shaver* in expanding the rules of *res judicata*, it would be an abuse of discretion to do so retroactively, precluding claims that had been expressly preserved 4

Denied, J Tauro, DJ 7/16/90 **DOCKETED**

Appendix.

I. To treat a dismissal which was expressly "without prejudice" as being with prejudice violates both the letter and the purpose of the rules of *res judicata*.

Justice Skinner's prior dismissal of the plaintiff's state law claims was expressly without prejudice. To rule — as this Court just has — that the plaintiff's state law claims should nonetheless be treated as being completely barred on the basis of *res judicata*, turns that doctrine on its head, violating both its letter and its purpose.

A. The rules of *res judicata* clearly exclude from their scope claims that were expressly dismissed "without prejudice" in the prior action.

The plaintiff has no quarrel with authorities that say that all related claims must be asserted in one's first lawsuit or lost. However, to treat a claim as not asserted — when it *was* asserted but dismissed without prejudice — because only one of two bases for federal court jurisdiction was pled, is to treat the jurisdictional basis as part of the substantive claim.

It is "black letter law" that substance and procedure are separate. Were this not so, diversity actions would have to be tried in federal court under the rules of procedure of the state whose law created the claim.

Justice Skinner consciously chose to use the words "without prejudice" knowing that they are (as this court has derisively chosen to call them) "magic words" — as are all words of art that have been established as standard dispositions. They have a specific effect which may not be disregarded.

This Court relied, in its Memorandum, on the *Restatement of Judgments (Second)*, specifically § 24, for the general rule of claim preclusion. Again, the plaintiff has no disagreement with this general rule, but points out that § 26 of the *Restatement (Second)* recognizes clear exceptions to such claim preclusion. Indeed, this Court's Memorandum noted (at p. 9) the existence of § 26(f), dealing with discretionary exceptions to preclusion. It is hard to see how this court could have read § 26(f) without having noticed § 26(b)'s exception for when:

> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action;

Dismissal "without prejudice" is, of course, the classic way to reserve a plaintiff's right to maintain an action again.

No binding authority has been cited for ignoring this clear expression of the common understanding of the effect of dismissing a case without prejudice.

The Memorandum's citation of *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 69 L.Ed.2d 103, 101 S.Ct. 2424 (1981) is totally inapplicable, as (1) that case dealt with claims that had been entirely omitted from Brown's first action and (2) the initial Brown and Moitie actions had been dismissed "in their entirety" (452 U.S. at 396, 69 L.Ed.2d at 107).[1]

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[1]Although decided under the name of *Moitie*, it was the facts of *Brown* that were the basis for the decision, as

(continued...)

Thus, under the letter of the traditional rules of *res judicata*, the plaintiff's state law claims are not precluded.

B. If this Court is to follow *Shaver* in expanding the rules of *res judicata*, it would be an abuse of discretion to do so retroactively, precluding claims that had been expressly preserved.

The plaintiff has pointed out the total lack of deference that has been shown to the Memorandum's persuasive authority, *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988), *cert den* 109 S.Ct. 145 (#88-225, October 3, 1988), a two-to-one decision of three-member panel of the Seventh Circuit, which has been followed on this point by no other case (not even in the Seventh Circuit) — until this one.

To adopt the rule announced in *Shaver* would have the undesirable effect of forcing plaintiffs to plead diversity as well as pendent jurisdiction to keep their cases in federal court even after dismissal of their federal claims. As a matter of judicial economy, this runs counter to the general effort to minimize the use of diversity jurisdiction.

However, if this Court chooses to do follow *Shaver*, it may not do so retroactively. It may not deprive this plaintiff of his day in court where that day in

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[1](...continued)
Moltie was voluntarily dismissed before decision (see footnote 1 on the page of the opinion just cited).

court was expressly reserved to him by Justice Skinner.

It may not ambush the plaintiff by applying the unprecedented March 2, 1988 *Shaver* decision to a case that was filed in 1985 and dismissed in 1986. Had the plaintiff any inkling that such a case was on the horizon, diversity jurisdiction would have been asserted along with pendent jurisdiction. The Memorandum argues that nothing prevented the plaintiff from doing so. However, until now, nothing indicated that it would be necessary to do so. Indeed, the oft-expressed preference of federal courts that purely state law cases should be tried in state courts indicated that it would, in fact, be undesirable to do so, being preferable to go to state court with the case if appeal of the dismissal of the federal claim was unsuccessful.

As the general sentiment in the federal courts has been one of hostility to the use of diversity jurisdiction, it is hard to understand why a rule should be adopted here to *require* its assertion, rather than to allow a case to be taken back to the state courts after the federal claim involved is dismissed.

If any reason is needed to invoke the "occasional exception" to preclusion this Court recognizes can be allowed (*Memorandum* at page 9), this is one reason — unfair surprise. The most basic is that the root purpose behind the rules of *res judicata* is to protect the parties' right to clarity and certainty of result.

To retroactively expand the doctrine of *res judicata* to convert a dismissal without prejudice into a dismissal with prejudice is to appropriate the doct-

rine's name to oppose both its traditional rules and its root purpose.

The plaintiff went to state court with this action because it was clear that an argument could be made that he had waived diversity jurisdiction by not asserting it the first time.

If the defendant had been desirous of an adjudication on the merits on the state claims in the first action, the defendant should have asked Justice Skinner to retain the state claims under pendent jurisdiction or suggested to him the applicability of diversity jurisdiction. It could therefore even be held that the defendant has waived the use of diversity jurisdiction, barring this removal, and requiring a remand to state court. However, such a waiver-based remand would be of questionable validity. The best course is to retain jurisdiction here and allow this case to proceed to trial.

If the rules of compulsory joinder are to be extended to jurisdictional bases as well as claims, it should be done only prospectively. Such a change in the law *may not* be put into effect retroactively. As can be seen here, the effect of such retroactive application is impermissibly harsh and unpredictable, as it robs Justice Skinner's disposition of its intended effect and deprives Carl Kale of his day in court.

To change the rules retroactively, on the thinnest of precedent, while pretending that no change has been made, to foreclose a case that was expressly held open, is the grossest abuse of discretion.

Conclusion

This Court should reconsider the defendant's motion and vacate its dismissal of this case.

Appendix.

Respectfully submitted,

CARL KALE

By his attorneys,

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May 11, 1990

Certificate of Service

The undersigned hereby certifies that on May 11, 1990, he served a true copy of the foregoing by causing it to be deposited in the United States Mail, 1st class postage prepaid, addressed to:

Kenneth M. Bello, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, Massachusetts 02111

Philip R. Olenick
Philip R. Olenick

Appendix.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CARL KALE	)	
Plaintiff	)	
v.	)	Civil Action
COMBINED INSURANCE	)	No.85-1840-S
COMPANY OF AMERICA,	)	
Defendant	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Plaintiff Carl Kale hereby opposes the motion of defendant Combined Insurance Company of America (Combined) to dismiss the Complaint or, in the alternative, for summary judgment.

Combined makes two basic arguments:

First, that District Judge Skinner's prior explicit dismissal "without prejudice" of the plaintiff's pendent state law contract claim upon the dismissal (as late-filed) of his federal Age Discrimination in Employment Act (ADEA) claim should actually have been a *with* prejudice dismissal of all claims, due to the availability of an alternative basis for jurisdiction which had not been asserted (although Combined did not contest this ruling at the time); and

Second, that the plaintiff's Count VI, for negligent breach of implied covenant of good faith and fair dealing and of specific contractual rights, fails to state a claim and, being a tort claim, is time-barred.

These arguments will be addressed separately.

Appendix.

The With Prejudice "Without Prejudice" Dismissal

In support of its motion, Combined has submitted, as Exhibit B to the Affidavit of Kenneth M. Bello, Esquire, a copy of District Judge Skinner's **Memorandum and Order**, which granted the defendant's motion for summary judgment with respect to the plaintiff's federal ADEA claim, and expressly dismissed the state law contract claim "without prejudice" (Memorandum and Order, page 4) citing *United Mine Workers v. Gibbs*, 383 U. S. 715, 16 L.Ed.2d 218, 86 S.Ct. 1130 (1966).

U.M.W. v. Gibbs had held, of course, that:

> Certainly, if the federal claims are dismissed without trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate . . . the state claims may be dismissed without prejudice and left for resolution to state tribunals.

383 U.S. at 726-727, 16 L.Ed.2d at 228, 86 S.Ct. at 1139. Although it cites numerous cases for the general rules of *res judicata*, Combined relies primarily on two cases, *Cemer v. Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978) and *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988), *cert den* 109 S.Ct. 145 (#88-225, October 3, 1988).

Cemer involved a plaintiff who initially brought only a federal claim, and, after that claim had been dismissed, later filed a state court action on a state claim. After removal to federal court on the basis of diversity of citizenship, the state law claim was dismissed as *res judicata*, on the basis of traditional

rules of compulsory joinder of claims, as it had been omitted from the first action. The Sixth Circuit brushed aside the plaintiff's argument that the original dismissal should have been on the basis of lack of jurisdiction rather than on statute of limitations grounds (a distinction which would have denied *res judicata* effect to the original dismissal) by saying that the plaintiff had waived any such objection by not raising it in a direct appeal from the dismissal.

Combined relies on *Cemer* for its observation that since diversity jurisdiction had existed to support joinder of the state law claim, there was no excuse for having omitted the claim, as might have existed if the only basis for joining it had been the discretionary exercise of pendent jurisdiction.

But *Cemer* dealt with an omitted claim in a closed case, and as such it has no application where the claim objected to was not omitted at all, and the case was dismissed "without prejudice."

Combined's trump case is *Shaver*, in which two judges from the Seventh Circuit held that failure to have asserted diversity jurisdiction in the first action rendered the dismissal of pendent claims upon summary judgment on the federal claim *res judicata*. A bitter dissent, after noting that the others had reached out to decide this issue although the District Court had granted summary judgment on the merits to the defendant without reaching this issue, pointed out that there was no authority for requiring the mandatory invocation of diversity jurisdiction rather than trying the remaining state claim in state court, citing *U.M.W. v. Gibbs*.

While the majority in *Shaver* tried to depict their holding as being based on "fundamental and substantial justice" (840 F.2d at 1368), the arbitrary impact of their rule cannot be ignored: had diversity in the original action been precluded by the joinder of a managerial employee as a co-defendant, the rule the *Shaver* majority perceived would not have protected the employer. What aspect of "fundamental and substantial justice" is implicated by allowing a defendant to benefit by the fortuity of whether or not another defendant had also been joined in an action that has long ago been dismissed?

Plaintiff's counsel has not been able to locate any other case that has followed *Shaver* in invoking, in effect, "compulsory joinder of alternative jurisdictional bases."[2] Counsel's Lexis search, which found cases as recent as Friday, August 18, found merely a small number of cases which have cited *Shaver* for the unexceptionable holding that *claims* arising out of a common nucleus of operative facts, including

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[2]It was the defendant, not the plaintiff, that asserted diversity jurisdiction and brought this case here, after the plaintiff filed in Middlesex Superior Court. Despite Combined's argument on pages 2 and 4 of its Memorandum that the plaintiff should have sought to amend his complaint after the dismissal to assert diversity jurisdiction, there can be no doubt that such an amendment would have been opposed by Combined on the basis that the plaintiff's effort to claim diversity jurisdiction had been waived by not having been asserted initially.

terminations of employment, must be joined or lost, for which it is hardly a ground-breaking authority.

Whether or not the First Circuit would adopt the *Shaver* panel's innovative expansion of *res judicata* (which plaintiff's attorneys doubt), it is not open to Combined to argue it here, given its waiver of this issue at the time of the dismissal:

The plaintiff appealed from District Judge Skinner's grant of summary judgment on the federal claim in the *Memorandum and Order* submitted to this Court as an exhibit to Mr. Bello's affidavit.

Combined appealed District Judge Skinner's separate denial of sanctions to it against the plaintiff and its counsel.

Neither appeal succeeded, though the plaintiff's appeal did elicit the first opinion in this Circuit expressly holding that equitable tolling is available in ADEA cases.

Combined never challenged — nor did it cross-appeal from — District Judge Skinner's explicit ruling, in the order the plaintiff appealed from, that the dismissal was to be "without prejudice."

Just as the plaintiff in *Cemer* was held to have waived any disagreement he may have had about the basis or effect of the dismissal of his claim by failing to take a direct appeal of the basis for that dismissal, Combined's failure to appeal that ruling must be treated as a waiver of any disagreement it may have had with District Judge Skinner's dismissal of the state claim as being "without prejudice."

This sort of waiver is quite common. The First Circuit used it in *Raxton Corporation v. Anania Associates, Inc.*, 668 F.2d 622, at 624 (1st Cir.

1982), as did the Second Circuit in *Fogel v. Chestnutt*, 668 F.2d 100, 108-09 (2nd Cir. 1981), *cert den* 459 U.S. 828 (1982), *reh den* 459 U.S. 1059 (1982). The D.C. Circuit expressly followed both of those cases in holding, in *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-90, 1102-03 (D.C. Cir. 1984), *cert den* 469 U.S. 1181 (1985), that the District Court had properly refused to reopen issues omitted from a prior appeal.

As Combined did not appeal District Judge Skinner's dismissal of the state claim as being "without prejudice," it has waived any argument that the claim should not have survived.

As that state claim survived, that should allow the assertion with it of other state claims that a trial court would have the discretion to allow amendment into an action based on the original surviving claim. This leaves out only intentional infliction of emotional distress (which had been voluntarily dismissed) and claims which would be time-barred and as to which no relation-back or tolling would be applicable. (See below for to the application of these principles to the tort claim.)

In fact, under principles of notice pleading, the bulk of the plaintiff's Counts in this action are inherent in the broad wording of the original surviving claim, which was supportable under various theories that are here merely spelled out separately for clarity. (The defendant appears to understand the extent to which they are implicit in the original claim, though it calls them new theories.) Although Counts I and II, by seeking declaratory relief, seek only a subset of the relief sought by the original

surviving claim, they are ultimately based on the same legal theories.

The Claim of Negligent Breach of Implied Covenant of Good Faith and Fair Dealing

Combined argues, at the bottom of page 2 of its Memorandum, that "Massachusetts does not recognize a 'negligent' implied covenant of good faith and fair dealing." Of course, the plaintiff is not alleging the existence of a negligent *covenant* (whatever that is) but a negligent *breach*, so Combined's argument that Count VI should be dismissed for failure to state a claim appears to be based on a misreading of the Complaint.

Combined also states that Count VI, for negligent breach of implied covenant of good faith and fair dealing and of specific contractual rights, being a tort claim, is time-barred.

The original federal district court action was commenced in May of 1985, almost precisely two years after the plaintiff's discharge in May of 1983. This would have been within the three year limitations period for a tort.

Under Federal Rule 15(c), the plaintiff could have moved to amend his complaint to add this claim, with the amendment relating back to the date of the complaint. As this was so, the time clock on such a claim was effectively tolled by the filing of the complaint, as both the Massachusetts and Federal Rules 3 provide for commencement of an action simply by filing.

Had the plaintiff succeeded in his appeal of summary judgment, he could have amended his complaint to bring back in his state law claims, including

adding the tort claim, thus the clock had not yet resumed running, as any such amendment would still have related back.

The clock did not begin to run again on the tort claim until the First Circuit denied the plaintiff's appeal, in November of 1988, at which point it began to run with two years already elapsed. The plaintiff brought this new action in May of 1989, approximately six months after the First Circuit's denial of his appeal, with only about two and a half years run on the three year tort claim limitations period. (Similarly, as to the contract claims, only the same approximately two and a half years had run, so that, far from being re-filed on the last possible day, as implied by Combined in its Memorandum, the plaintiff actually still had more than half of the six year contract claim limitations period remaining.)

The Request for Summary Judgment

Combined's request for summary judgment if dismissal is not granted is not supported by any factual showing. The plaintiff's Complaint is at least verified under the pains and penalties of perjury, giving it the effect of an affidavit. If either party is entitled to summary judgment on this record, it is the plaintiff.

Appendix.

Respectfully submitted,

CARL KALE

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Certificate of Service

The undersigned hereby certifies that on August 25, 1989, he served a true copy of the foregoing by causing it to be deposited in the United States Mail, 1st class postage prepaid, addressed to:

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